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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AD16

[Public Notice: 7915]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category X

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category X (personal protective equipment and shelters) of the U.S. Munitions List (USML) to describe more precisely the materials warranting control on the USML.

DATES: The Department of State will accept comments on this proposed rule until [insert date 45 days from date of publication in the *Federal Register*].

ADDRESSES: Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: DDTCResponseTeam@state.gov with the subject line, "ITAR Amendment – Category X."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AD16).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because

those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmddtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792; e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category X.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The items subject to the jurisdiction of the ITAR, *i.e.*, “defense articles,” are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730-774, which includes the Commerce Control List (CCL) in Supplement No. 1 to Part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (see "Commerce Control List: Revising Descriptions of Items and Foreign Availability," 75 FR 76664 (December 9, 2010) and "Revisions to the United States Munitions List," 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of a "bright line" between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with U.S. allies, enhancing the defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end-uses, and end-users of greater concern than NATO allies and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML was revised and became

final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Revision of Category X

This proposed rule revises USML Category X, covering personal protective equipment and shelters, to advance the national security objectives set forth above and to more accurately describe the articles within the category, in order to establish a "bright line" between the USML and the CCL for the control of these articles.

Body armor enumerated in paragraph (a)(1) would be that which meets or exceeds NIJ Standard-0101.06 Type IV. Type III body armor would be controlled on the CCL in proposed ECCN 1A613.

Anti-gravity suits, pressure suits, and atmosphere diving suits, currently controlled in paragraphs (a)(3), (a)(4), and (a)(5), respectively, would become subject to the EAR.

Paragraph (a)(7) would control certain protective goggles, spectacles, and visors with an optical density of 3 or greater.

Permanent and transportable shelters, currently controlled in paragraph (b), as well as equipment for the production of articles covered in this category (current paragraph (c)), would be controlled on the CCL in ECCNs 1A613 and 1B613, respectively.

Paragraph (d), which controls parts and components, is limited in scope to include only ceramic or composite body armor plates, laser protective lenses for the articles enumerated in (a)(7), and classified hardware. As with the revision of other categories, the USML will not control all generic, non-specific parts, components, accessories, and attachments that are in any way specifically designed or modified for a defense article, regardless of their significance to maintaining a military advantage for the United States. These items would become subject to the new 600 series controls in Category 1 of the CCL, to be published separately by the Department of Commerce.

Finally, paragraph (f), which currently provides interpretations of Category X, is removed and placed in reserve.

Definition for Specially Designed

Although one of the goals of the export control reform initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term “specially designed.” It is, therefore, necessary for the Department to define the term. Two proposed definitions have been published to date.

The Department first provided a draft definition for “specially designed” in the December 2010 ANPRM (75 FR 76935) and noted the term would be used minimally in the USML, and then only to remain consistent with the Wassenaar Arrangement or other multilateral regime obligation or when no other reasonable option exists to describe the control without using the term. The draft definition provided at that time is as follows: “For the purposes of this Subchapter, the term ‘specially designed’ means that the end-item, equipment, accessory, attachment, system, component, or part (*see* ITAR §121.8) has properties that (i) distinguish it for certain predetermined

purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML.”

The Department of Commerce subsequently published on July 15, 2011, for public comment, the Administration’s proposed definition of “specially designed” that would be common to the CCL and the USML. The public provided more than 40 comments on that proposed definition on or before the September 13 deadline for comments. The Departments of State, Commerce, and Defense are now reviewing those comments and related issues, and the Departments of State and Commerce plan to publish for public comment another proposed rule on a definition of “specially designed” that would be common to the USML and the CCL. In the interim, and for the purpose of evaluation of this proposed rule, reviewers should use the definition provided in the December ANPRM.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following:

- 1) A key goal of this rulemaking is to ensure the USML and the CCL together control all the items that meet Wassenaar Arrangement commitments embodied in Munitions List Category 13 (WA-ML13). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category X contained in this notice and the new Category 1 ECCNs published separately by the Department of Commerce when reviewed together.

2) The key goal of this rulemaking is to establish a “bright line” between the USML and the CCL for the control of these materials. The public is asked to provide specific examples of materials and miscellaneous articles whose jurisdiction would be in doubt based on this revision.

Regulatory Analysis And Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from §553 (Rulemaking) and §554 (Adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400-AC78), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This proposed amendment does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 121

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is proposed to be amended as follows:

PART 121 – THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List

Category X to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category X— Personal Protective Equipment and Shelters

(a) Personal protective equipment, as follows:

(1) Body armor providing a protection level equal to or greater than NIJ Type IV.

Note 1 to (a)(1): See National Institute of Justice Classification, NIJ Standard-0101.06.

Note 2 to (a)(1): For body armor providing a level of protection of Type I, Type II, Type IIA, Type IIIA, or Type III, see ECCNs 1A005 and 1A613.

(2) Personal protective clothing, equipment, or face paints “specially designed” to protect against or reduce detection by radar, IR, or other sensors at wavelengths greater than 900 nanometers.

Note to (a)(2): See Category XIII(j) for controls on related materials.

(3) [Reserved]

(4) [Reserved]

(5) Integrated helmets, not specified in Category VIII (h)(15) or Category XII, incorporating optical sights or slewing devices, which include the ability to aim, launch, track, or manage munitions.

(6) Helmets and helmet shells providing a protection level equal to or greater than NIJ Type IV.

(7) Goggles, spectacles, or visors, employing other than common broadband absorptive dyes and UV inhibitors as a means of protection (*e.g.*, narrow band filters/dyes or broadband limiters/coatings with high visible transparency), with optical density greater than 3 that protect against:

(i) Visible (in-band) wavelengths;

- (ii) Thermal flashes associated with nuclear detonations; or
- (iii) Near infrared or ultraviolet (out-of-band) wavelengths.

Note 1 to (a)(7): See Category XIII(j) for controls on related materials.

Note 2 to (a)(7): See Category XII for sensor protection equipment.

(8) Developmental personal protective equipment and shelters and “specially designed” parts, components, accessories, and attachments therefor, developed under a contract with the U.S. Department of Defense.

Note to (a)(8): Developmental personal protective equipment and shelters, and “specially designed” parts, components, accessories, and attachments therefor, determined to be subject to the EAR via a commodity jurisdiction determination (*see* §120.4 of this subchapter) are not controlled by this paragraph.

(b) [Reserved]

(c) [Reserved]

(d) Parts, components, assemblies, and associated equipment for the personal protective equipment controlled in this category as follows:

(1) Ceramic or composite plates that provide protection equal to or greater than NIJ Type IV.

(2) Lenses for the goggles, spectacles, and visors controlled in paragraph (a)(7) of this category.

(3) Any component, part, accessory, attachment, equipment, or system that:

- (i) Is classified;
- (ii) Contains classified software;
- (iii) Is manufactured using classified production data; or
- (iv) Is being developed using classified information.

“Classified” means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant

thereto or equivalent, or to the corresponding classification rules of another government.

(e) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.

(f) [Reserved]

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May 31, 2012
(Date)

Rose E. Gottemoeller,
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